APPENDIX

APPENDIX A

December 5, 1968

Solicitor General of the United States
Department Of Justice
9th & Pennsylvania Avenue
Washington, D. C.
Attention: Daniel M. Friedman (5th Floor)

Re: Bernhard Rosee
Vs: Board of Trade of the City of Chicago, et al, U. S. Court of Appeals for the Seventh Circuit, Case Nos. 15886 and 16373; and Petition for Certiorari in the U. S. Supreme Court, No. 763

Dear Sir:

In accordance with your request made during our telephone conversation of December 3, 1968, I herewith call to your attention the misstatements made by Mr. William Kanter, an attorney, associated with the Justice Department and others in their Reply Brief filed in the U. S. Court of Appeals, for the Seventh Circuit filed on May 2, 1968.

On page 4 of the Reply Brief in which he states: "after extensive discovery proceedings taking place for two and one half years . . . ." this statement is very misleading and is an attempt to deceive the Court, and made the Court believe that I had (plaintiff appellant or petitioner) had a completed discovery, which is untrue.

Plaintiff appellant served a Subpoena duces tecum on October 1963, for a production of the documents in the possession of the government and other defendants. The U. S. Attorney, Mr. McGlendon, representing defendant Kibby and Gordon, refused to comply with the subpoena.

One year later, October 1, 1964, he offered the documents for an in camera inspection to the trial court over the objection of my attorney, William Harte, and plaintiff appellant has no knowledge what documents were submitted to court *in camera*. (See Supp. App. Ct. Appeals, pages 16 to 18) The most vital records which would prove plaintiff appellant's case have been withheld for the past 8 years, which records could have immediately proven plaintiff's case.

Mr. Kibby testified (appendix 248) that the agency of the Commodity Exchange Authority received confirmation from the Board of Trade Clearing Corporation and these documents submitted to Kirby by the Clearing House of the Board of Trade would prove that plaintiff was a victim of fraud and conspiracy, and also prove the existence of an account No. 45; also account No. 35 and would disclose the real ownership of these two accounts. Under the Commodity Exchange Act, Sec. 1.5, the Secretary of Agriculture, U. S. Attorney Mr. McGlendon, and the trial court abused their discretion and withheld the records from plaintiff appellant to prove his case. Because Sec. 1.5 reads as follows:

> **"Information confidential; disclosures to contract-market committees and officials. No officer or employee of the Department of Agriculture shall publish, divulge, or make known in any manner, except insofar as may be required in the performance of his official duties or by a court of competent jurisdiction, any facts or information regarding the business of any person which may come to the knowledge of such officer or employee through any inspection or examination of the reports or records of, or through any information given by, any person pursuant to the Commodity Exchange Act or these rules and regulations: Provided, however, That this prohibition shall not apply to disclosures made in good faith to the Business**

Conduct Committee or other proper committee or official of a contract market of matters in respect to which such contract market has responsibility or duty under the Commodity Exchange Act, or which, in the judgment of the Act Administrator, adversely affect such market or are prejudicial to the interest of producers or consumers."

The above statute, Sec. 1.5, proves that plaintiff appellant was deprived the right to obtain the records enabling him to prove his case.

Although the trial court made two decisions—35 F.R.D. 512, 36 F.R.D. 584, in which the court stated that the records should be made available; nevertheless, Mr. McGlendon refused to supply these records and instead gave it to the court in camera. Plaintiff appellant was prevented from obtaining the true records which is required to be kept by each commission merchant under the Commodity Exchange Act, Sec. 131-137 inclusive.

Although plaintiff appellant received very few documents from Mr. McGlendon during the month of April, 1965, some were the most shocking and falsified documents, Exhibit A, Ct Appeals App. 141-145 inclusive; also, Supp. App. Ct Appeals 43-44, and plaintiff appellant was prevented from cross-examining the parties who prepared these documents. Furthermore, the falsehood of these documents could be proven by the confirmation submitted by the Board of Trade Clearing Corporation to the Commodity Exchange Authority as Mr. Kirby testified, App. Ct Appeals 248-250.

On pages 6, 7, 12, 14, 15, 17 and 18 of said brief, Mr. Kanter stated repeatedly that all the acts of Kibby and Gordon, defendant government employees, were done within the "outer perimeter"; Mr. Kanter also infers that plaintiff alleges a "private conspiracy". The statements and inferences serve only to confuse the issues.

Mr. Kanter should not have made these statements nor should he have cited cases which had no bearing to my case, because:

1. The Assistant U. S. Attorney, Barry J. Freeman, in his Notice of Removal, dated July 29, 1963, stated that "All of the alleged acts or omissions took place in the course of the official duties of the petitioner's and under color of their office as officers of the Commodity Exchange Authority". A copy of the Notice and Petition is attached.

2. The affidavits of William S. Jacob, former attorney, and the affidavit of Melvin A. Brandt, former attorney, set forth in the Sup. App. of plaintiff, filed in the U. S. Court of Appeals, Seventh Circuit (pp. 52-55 and pp. 56-57 respectively) conclusively proves that the actions of Kibby and Gordon and others were under color of office and that the action of Kibby was an act of malice.

Another instance of misstatement is set forth in the reply of the attorney in the Justice Department to plaintiff appellant's motion under Rule 60(b) of the Federal Rules of Civil Procedure (U. S. Ct. of App. Appendix, page 186). Here the Department states that plaintiff's assertion that the court did not determine that plaintiff was in a deficit position of $52,950.75, or any other amount.

This statement is clearly false because the trial court determined that plaintiff was in a deficit position (Appendix—pages 35, 37, 38, 41, 42, 50, 52, 53, 56, 61, 64, 65, 66, 67, 70, 74, 75, 76, 78, 79 and 128). The Department of Justice also states on page 186 of the Appendix: "In the second place, any information about a deficit in plaintiff's account in the amount of $52,950.75 could not have come from the questioned document. Such a figure does not appear on the document nor can it be derived from the document by any mathematical calculations." This foregoing

statement is another example of the numerous false statements made by the Department because the document referred to, which appears on page 142 of the Court of Appeals Appendix, clearly shows the deficit of $52,950.75 in plaintiff's account.

On page 19 of the Reply Brief dated May 2, 1968 to the Court of Appeals on behalf of Kibby & Gordon, Mr. Kanter states that the reports contained in Exhibit "A" were prepared by G. Edward Piala. This statement is a device to free Kibby & Gordon of the guilt in the conspiracy. The deposition of Clarence De Witt, agent of the C.E.A., shows conclusively that the investigation of Baggott & Morrisson was conducted and directed by Mr. Kibby (Ct Appeals App. 233-235). As a result of this investigation Baggott & Morrison were found guilty (Docket 93 Ct. of Appeals App. 235-239).

Furthermore, defendant, Samuel F. Gordon, testified in his deposition on April 7th and 8th, 1965, that he worked with Mr. Kibby in the investigation of Baggott & Morrison in the latter part of 1960 and the early part of 1961. (Ct. Appeals Supp. Append. 93-94)

It is clear from the above affirmative facts that Kibby & Gordon, with the assistance of Clarence De Witt, conducted the investigation and the affidavit of Piala is false and fraudulent. Furthermore, I was deprived the right to take Mr. Piala's deposition. The trial court closed the discovery on May 18, 1965, before I had a chance to examine both Mr. Piala and the agent who prepared Exhibit 43-44, Supp. Ct. Appeals.

Appendix 187, Ct. Appeals, in Memorandum Contra to Motion under 60(b), the attorney in the Justice Department states that, "It ignores the deficit in Account No. 35" as though Account No. 35 belonged to plaintiff.

Mr. Kanter ignores the true fact that:

> "On page 30 of Court of Appeals Supplemental App. of Plaintiff-Appellant (Consolidated Appeals Nos. 15886 and 16373) the actual document reflecting Account No. 35 is shown without any identifying name and address. This is contrary to the wish of Congress and in direct violation of Sec. 1.37 of the Commodity Exchange Act."

Mr. Kanter ignored the fact that Account No. 45 was combined with Account No. 35, which is a gross violation of Sec. 17.01 of the C.E.A. He also should have noticed the testimony of Mr. Morrison in the Arbitration Proceedings (Supp. App. Court of Appeals, p. 32), as follows:

TESTIMONY OF ARBITRATION PROCEEDINGS

> "Mr. Morrison: I can explain that we give numbers to new accounts. I was given 45, and Jim was given 35 when he filled his order, and I believe when we got in the office we changed the name, and it started as 45 and 35, and—
>
> Mr. Morrison: The trade was made on the floor, and I believe I gave it the number on the card on the floor. Actually, I had nothing to say or do in determining whether it was to be—I think my card was marked 45 to start with, but the 45 and the 35 wound up later as the 35 Account.
>
> Mr. Herr: That was explained.
>
> Mr. Morrison: The first time, I must have been told to use the number 45, because I couldn't have pulled it out of a hat."

Mr. Friedman, this is only a small fraction of the perpetrated fraud and conspiracy against me, and if the true records were produced, it would conclusively show misrepresentation, forgery, perjury, falsified records, manufactured records, manipulated records, conversion of funds and embezzlement.

I appeal to you for the sake of justice that you take the necessary steps to enable me to obtain the original records and correct the wrong doings, so that I can prove my innocence. If this is not corrected, the entire Commodity Exchange Act is destroyed.

Respectfully submitted,

Bernhard Rosee
1260 North Dearborn Street
Park Dearborn Hotel
Chicago, Illinois 60610

December 7, 1968

Honorable Daniel M. Friedman
% Solicitor General of the United States
Department of Justice
9th & Pennsylvania Avenue
Washington, D. C.

Dear Sir:

In further reference to my letter of December 5th, I herewith submit the statement of Mr. William Kanter, Attorney, Department of Justice, submitted to the U. S. Court of Appeals in Chicago, appearing on pages 21 and 22, in which he wilfully misinterprets the position journal which was obtained by the Court Order from Baggot & Morrison. This position journal is an affirmative act of fraud and contains approximately 320 manipulated entries, this violation being an affirmative violation of Sec. 4b (A) (B) (C).

This violation carries a $10,000.00 fine or one year in jail or both. I am attaching a copy of the above mentioned Sec. 4b (A) (B) (C).

On page 24 of the same reply brief, Mr. Kanter attempts to cover up the embezzlement of $20,000.00 by Baggot &

Morrison by stating that this $20,000.00 had been repaid. This statement is a wilfull act of fraud on the U. S. Court of Appeals in order to protect Kibby & Gordon, Baggot & Morrison and the members of the Arbitration Committee in this conspiracy, because the $20,000.00 which Mr. Kanter refers to was paid directly to the Customer's Segregated Account, which apparently Baggot & Morrison embezzled from other customers and were forced to repay. My $20,000.00 was never repaid to me. See check issued by Baggot & Morrison on November 17, 1959, Ct. Appeals, Supp. App. page 83.

Mr. Kanter surely must have seen Ct. Appeals App. 259, which conclusively shows there was in existence two accounts—No. 35 and No. 45. Nevertheless Mr. Kanter chose to aid these conspirators and to destroy me. These facts have not been stated in my Petition to the Supreme Court because I felt that you, Mr. Friedman, could do it more efficiently to correct these wrong doings.

I am also enclosing a photostat copy of Universal Oil Company c. Root Rfg. Co., pages 580-581, especially note Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238. There are many other manipulated records and I have been prevented to prove these frauds against me because of the Commodity Exchange Authority refused to supply me with the records as did the Chicago Board of Trade Clearing Corporation.

Again, I appeal to you to find a way to restore my rights to enable me to have my day in Court.

Respectfully yours,

Bernhard Rosee
1260 N. Dearborn Street
Chicago, Illinois 60610

APPENDIX B

PETITION FOR REMOVAL

The petitioners, Albert K. Kibby and Sam Gordon, by James P. O'Brien, United States Attorney for the Northern District of Illinois, acting under the direction of the Attorney General of the United States, respectfully represent to the Court as follows:

1. The petitioners at all times relevant to the complaint were Federal Officers, holding positions with the Commodity Exchange Authority of the United States Department of Agriculture.

2. This is an action for damages against the petitioners and others in which it is alleged that the petitioners conspired with other defendants to destroy plaintiff's business, occupation, and livelihod as a member of the Chicago Board of Trade and that pursuant to said conspiracy, the petitioners contrived to conceal from plaintiff certain conversions of funds and falsifications of records committed by other defendants; "even though (the petitioners) had full knowledge of such occurrences and were repeatedly requested by plaintiff to take action with respect thereto."

3. All of the alleged acts or omissions took place in the course of the official duties of the petitioners and under color of their office as officers of the Commodity Exchange Authority, an agency of the United States Government.

4. This petition is filed under the direction of the Department of Justice of the United States and no bond is filed herewith. (28 U.S.C. §2408.) (*Nelson* v. *Peter Kiewil Sons Co.*, 130 F. Supp. 59).

5. Copies of the summons and complaint filed by the plaintiff in this case in the Circuit Court of Cook County, Illinois, are attached hereto.

WHEREFORE, petitioners respectfully ask that the said action be removed to this Court pursuant to the provisions of Section 1442(a)(1), Title 28, United States Code.

.....

James P. O'Brien
United States Attorney

State of Illinois)
) ss
County of Cook)

Barry J. Freeman, Assistant United States Attorney for the Northern District of Illinois, says that he is the attorney for Albert W. Kibby and Sam Gordon, as officers of the Commodity Exchange Authority of the United States Department of Agriculture; and that the facts alleged and statements set forth in the foregoing Petition for Removal are true as he verily believes.

.....

Barry J. Freeman
Assistant United States Attorney

Subscribed and sworn to before me
this 29th day of July, 1963.

.....

Notary Public
BJF:pm

APPENDIX C

In *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U.S. 292 Mr. Justice Cordozo stated: (p. 300)

> "The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. *Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.*"

Then again the Court stated: (p. 304, 305)

> "Regulatory commissions have been invested with board powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra*, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n.* (No. 2), 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. *All the more in-*

sistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. *United States,* 298 U.S. 38, 73) *of a fair and open hearing be maintained in its integrity. Morgan* v. *United States,* 298 U.S. 468, 480, 481; *Interstate Commerce Comm'n.* v. *Louisville & N.R. Co., supra. The right to such a hearing is one of 'the rudiments of fair play' (Chicago M. & St. P. Ry. Co.* v. *Polt,* 232 U.S. 165, 168) *assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), (No. 2) *supra; Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.''*

In *Garner* v. *Louisiana,* 368 U.S. 157, following *Ohio Bell Telephone,* Mr. Justice Frankfurter in his concurring opinion states (p. 175):

> ". . . . A judge's private knowledge, or even 'knowledge by notoriety,' to use Dean Wigmore's phrase, IX Evidence Sec. 2569 (Third ed. 1940), not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime. *Thompson* v. *City of Louisville,* 362 U. S. 199."

In *Thorpe* v. *Housing Authority,* 386 U. S. 670, Mr. Justice Douglas states (p. 678):

> "Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power' (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 369-370) and that the essence of due process is 'the protection of the individual against arbitrary action.' *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.,* 301 U.S. 292, 302; *Slochower* v. *Board of Education,* 350 U.S. 551, 559."